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STATE OF MICHIGAN

IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

JOSEPH STAMPLIS and
THEODORA STAMPLIS,

Plaintiffs-Appellants,

v

ST. JOHN HOSPITAL SYSTEM
d/b/a RIVER DISTRICT HOSPITAL,
and G. PHILLIP DOUGLASS, D.O.,
Jointly and severally,

Defendant-Appellees,

and
HENRY FORD HEALTH SYSTEMS d/b/a
HENRY FORD HOSPITAL,

Defendants.

Supreme Court
No.: 127032

Court of Appeals: No. 241801

St. Clair County K01-1051-NH
Hon. Daniel J. Kelly

BRIEF OF DEFENDANT-APPELLANT G. PHILLIP DOUGLASS IN REPLY TO PLAINTIFFS-APPELLEES' COMBINED BRIEF ON APPEAL

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BRIEF OF DEFENDANT-APPELLANT G. PHILLIP DOUGLASS IN REPLY TO PLAINTIFFS-APPELLEE'S COMBINED BRIEF ON APPEAL

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STATEMENT OF QUESTION PRESENTED

GIVEN THE INACCURACIES AND OMISSIONS OF PLAINTIFFS' PRINCIPAL SUPREME COURT BRIEF, IS IT WISE FOR THE SUPREME COURT TO CONSIDER THE WITHIN REPLY BRIEF FOR THE SAKE OF COMPLETENESS?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes."

The lower courts were not involved in this question.

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GIVEN PLAINTIFF'S LEGAL POSITION AND REFUSAL TO DISCUSS POINTS OF LAW REGISTERED BY DR. DOUGLASS, THIS REPLY BRIEF IS NECESSARY.

While every good appellate advocate sometimes makes liberal use of Application Briefs as the fundamental matrix for full calendar Michigan Supreme Court briefing, it is unusual, to say the least, to see a Plenary Michigan Supreme Court Brief which focuses so monomaniacally on the original Application version that solid arguments and points of law made by his or her opponents are simply ignored, in toto. But that is just what has happened here. Because of narrow space limitations for this Reply Brief, a few of the more important facets of our discussion can only be touched upon with brevity. We do so now.

MCLA 600.2925d Does Not Control

First of all, it is quite understandable why Plaintiffs would want to focus singularly upon the amendatory language of the 1995 enactment to MCLA 600.2925d, but only that language. This is so because that statutory language, on the surface (but only on the surface), seems to obviate any avenue for escape of liability on the part of Defendant Hospital here. But what is missed by Plaintiffs in their single-minded devotion to MCLA 600.2925d, as amended, is the policy effect of Plaintiffs' recreating any liability on the part of **Dr. Douglass**, who has been voluntarily exonerated by Plaintiffs from any tort liability by the dismissal with prejudice. With Dr. Douglass' tortious conduct no longer at issue, how can the Hospital be liable?

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Even with the 1995 amendments, which we respectfully submit are ineffective because the rest of the Contribution Act was left untouched, the statute, even as amended, clearly, inexorably explodes any possible liability for Dr. Douglass because, after all, "...the release or covenant does not discharge 1 or more of the **OTHER** persons for liability for the injury or wrongful death...." (Emphasis and capitals supplied.) This means that even as amended, the liability of **Dr. Douglass** is patently extinguished.

Repeatedly in Plaintiffs' essay is the recurrent theme that Dr. Douglass, despite his complete exoneration from tort liability, must nevertheless stand ready to be dragged back into this litigation, notwithstanding the events of formally dismissing him with prejudice, if that malleable status is what Plaintiffs deem necessary to get at the Hospital. There is no doubt but that Plaintiffs knowingly terminated Dr. Douglass' involvement with the case as a party, and intended to do so, once, for all time. But Plaintiffs have now retreated from that position. In Plaintiffs' Brief, pp 37-38, and, especially, the churlish analysis found at pp 43-49, Plaintiffs contend that Dr. Douglass should be content with having Plaintiffs change their ever-shaping contours of tort fault so as to drag Dr. Douglass back into the litigation despite the irrevocability of the original dismissal with prejudice as to him, just to immunize Plaintiffs' from their folly. This is so, despite the putative salvation of MCLA 600.2925(d) which states in subparagraph (a) that to be sure, the effective release or covenant

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not to sue of Dr. Douglass by the dismissal with prejudice clearly eviscerates any liability **as to him**. But, still, Plaintiffs nevertheless want to directly re-impose liability on Dr. Douglass, despite their promise of dismissal or, if push comes to shove, by the future ghosts of ruinous future indemnity.

Larkin Revisited

The better rule is that stated by Rzepka v Michael, 171 Mich App 748; 431 NW2d 441 (1988) which would simply end this controversy once and for all; Rzepka stands in opposition to the expeditious morphing of the previous dismissal of Dr. Douglass with prejudice into a covenant not to sue-style of a dismissal without prejudice in the style of Larkin v Otsego Memorial Hospital Assoc, 207 Mich App 391; 525 NW2d 475 (1994), a case which ought to be revisited for no other reason than Chief Justice Taylor's dissent. But, again, if Larkin provides rescue for those with Buyers Remorse, salvation for the legal tyros blissfully unaware of the legal effect of dismissals, it was **never** the expansive view of even the Larkin Majority which would have allowed the physician/ostensible agent to be swept back into the litigation vortex, notwithstanding his or her original dismissal with prejudice; Larkin expands the litigation to the Hospital, but did not do so as to the **doctor**, who was allowed to escape, something which the analysis of Plaintiffs' Brief, pp 43-49, does not have the intestinal fortitude to admit.

Put another way, this case presents the medical profession

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with an opportunity to finally overrule Larkin, to be construed in favor of what MCLA 600.2925a-d **actually** means. Plaintiffs' Brief can be scoured for any intimation or glimmer which recognizes inherent flaws in Plaintiffs' argument based upon a statute which, read as a whole, actually should be construed to mean the exact opposite of what Plaintiffs now contend.

Plaintiffs have also diligently avoided any discussion of what a Larkin-style reformation rule will really mean to the law or what form the changes should make if change there is to be. Contracts should never be subjected to the ability of judges to order that which the very contractual language itself prohibits. Are we now going to be treated to the spectacle of an endless series of Reformation Suits or Motions For Relief by plaintiffs acting with Buyer's Remorse, pursuant to MCR 2.612, whenever a party finds out what the **legal effect**[1] of a court order may be. If this be so, no settlement is ever final, no contract is ever final, no termination of liability is ever final, and despite the total exoneration of

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[1] Mistakes of law are usually never grounds for relief, absent unusually inequitable or fraudulent misconduct. Bomarko, Inc v Rapistan Corp, 207 Mich App 649, 525 NW2d 518 (1994). Here, all that Plaintiffs can show is they made a unilateral mistake of law which is generally not grounds for setting aside a consent order. Rzepka, supra. When the Plaintiffs make a thoughtful **legal** decision, that decision, even if unwise, it incontrovertibly acts to immunize the agreement from later reformation. MCR 2.612(C)(a) is not designed to relieve counsel of carelessly made legal decisions. Limbach v Oakland County Road Commissioners, 226 Mich App 389, 393, 573 NW2d 336 (1997) (a lawyer's legal misunderstanding does not furnish grounds for later reformation). Haberkorn v Chrysler Corp, 210 Mich App 354; 533 NW2d 373 (1995). Being "out lawyered" is not later grounds for relief.

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the agent, a release of a principal may not affect the agents and the release of agents or employees may not inure to the benefit of the hiring principal or employer. The rule of law proffered by Plaintiffs here is the amorphous rule of the idiosyncratic, by which trial and appellate judges are now empowered to ignore an extinction of liability on terms to their liking, so that clearly worded agreements today can always be refashioned by reformation tomorrow when, horror of horrors, they actually portend legal consequences for litigation in which everyone has a lawyer. If Larkin means every settlement or dismissal can be revised when convenient, Larkin should be corrected to give finality to such bargains.

MCLA 600.2925b(b)

Plaintiffs also whistle bravely past the graveyard of MCLA 600.2925b(b), the "single share" concept of which warrants nary a mention in Plaintiffs' Brief. MCLA 600.2925b(b) makes it clear that the collective liability of **both** Dr. Douglass and the Hospital are inextricably intertwined together to constitute "a single [liability] share", a view which consonant with the applicability of the Uniform Contribution Among Tortfeasors Act to militate sharply against any "joint tortfeasor" findings. Indeed, the "single share" thesis is effective to the point of extinguishing the liability of the principal hospital. A host of cases have suggested that the "single share" liability concept strongly militates against a finding of "joint tortfeasor" status between

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principal/agent, as these parties are but a single legal entity. See, for example, Alvarez v New Haven Register Inc, 735 A2d 306 (Conn 1999); Mamalis v Atlas Van Lines, Inc, 560 A2d 1380 (Pa 1989) (principal and agent a single liability share because the claim of vicarious liability is inseparable from the claim of tortious conduct against the agent).

Theophelis, Footnote 13 And Indemnity

Another area where Plaintiffs diligently avoid dealing with the global realities of the statute is their sedulous refusal to discuss MCLA 600.2925a(7), which, quite apart from the other portions of the Uniform Contribution Act, furnishes an entirely viable, alternative, additional rationale for sustaining the "release of one releases all" thesis prevalent in American law. It is to be recalled that Theophelis v Lansing General Hospital, 430 Mich 473; 424 NW2d 478 (fn 13) (1988) specifically embraces the movement in other courts ruling that it would be improper on policy grounds to hold a principal liable despite an agent's release, not merely because the tortious actions of the agent are exclusively the conduct at issue, but also, significantly, because the consequential, satellite indemnification actions against the agent would subvert the goal of the Contribution Act to achieve early and final settlement of all claims. Because the Act preserved the right of indemnification against the agent under MCLA 600.2925a(7) the Theophelis Court agreed with the cases condemning such satellite litigation as leading to "circuity of action" by virtue

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of duplicative indemnity. Indeed, because the raison d'etre for liability of the principal is always solely the conduct of the agent himself or herself, voluntarily exonerating the agent by the plaintiff, in justice, necessarily exonerates the principal as there is no other liability vehicle existing for the plaintiff to litigate in cases such as these where the alleged agent was the only active conduct tortfeasor. What justice sense, further, does it make to proceed against the exclusively vicariously liable principal who then may destroy the dismissed agent by indemnity?

Footnote 13 of Theophelis, which Plaintiffs diligently refuse to discuss, recognizes a host of American cases that require the dismissal of the agent as, in turn, absolutely requiring the dismissal of the principal simply to resolve the full exoneration of the agent, even from later indemnity. This is so not merely because the exclusive basis for liability on the part of the principal is the tortious conduct of the agent, but also because it is good policy to obviate unnecessary indemnification litigation if plaintiff agrees by release/dismissal the agent has no tort fault. See Craven v Lawson, 534 SW2d 653 (Tenn 1976) [cited by Theophelis], Alvarez, supra; Mamalis, supra; or Horejsi v Anderson, 353 NW2d 316 (ND 1984); Kelly v Avon Tape, Inc, 631 NE2d 1013 (Mass 1994) (any general release given to an agent necessarily precludes a subsequent action against the principal because the liability of the two parties are based upon the same tort facts, i.e., the actions of the agent); and Ann Arundel Medical Center, Inc v

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Condon, 649 A2d 1189 (Md App 1994) (because of indemnification liability, the agent would never agree to a settlement as he or she could always be dragged back into the case by a Hospital, a specter directly against the public policy of favoring settlements); Bristow v Griffitts Construction Co, 488 NE2d 332 (Ill App 1986); Williams v Vandeburg, 620 NW2d 187 (SD 2000) (such circuity of action and multiplicity of [indemnification] lawsuits can be readily avoided by implementing a rule where "release to one is a release to all"); Nelson v Gillette, 571 NW2d 332, 339 (ND 1997); Andrade v Johnson, 546 SE2d 665 (SC App 2001) rev'd on other grounds, 588 SE2d 588 (2003).

Attorney Jane Garrett

Which leads us to our next point of rebuttal. Defense Attorney Jane Garrett has been portrayed and pilloried as if she were a shameless, Paid Hessian, whose alchemy tricked a less knowledgeable plaintiff's attorney[2] into dismissing Dr. Douglass with prejudice, because that release/dismissal had a surprisingly pejorative legal effect on the continuing liability of the Hospital. Attempting to make Jane Garrett look slick or dishonest is, in the opinion of undersigned Appellate Counsel, a travesty. As Thomas P. "Tip" O'Neill famously said about politics, the "law

[2] Jeremiah Kenney, left the Kitch, Drutchas law firm some time after his involvement in the Vickers case relating to St. John Hospital. As footnote 12 of Plaintiffs' Brief on page 47 makes clear, Lawyer Kenney, with 30 years' experience, fully knew the dangers of the rule of law in Vickers about dismissal of an agent and its possibly detrimental legal effects as to a principal.

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ain't tiddlywinks". Plaintiffs were represented by an extremely able trial lawyer. There is no dispute but that Jane Garrett did not misrepresent an iota of what Dr. Douglass wanted: always, always it was a dismissal **with** prejudice. Mr. Kenney, for his 30 years of experience, did not obtain any independent stipulation on the record from River District/St. John Hospital that it would agree to continue liability, notwithstanding the vaporizing of tort liability allegations against Dr. Douglass. Those legal miscalculations by such an experienced lawyer have consequences.

Silent Fraud

As our Principal Brief makes clear, a contention that this was "silent fraud" falls embarrassingly short of the mark. But Plaintiffs' principal Supreme Court brief contains a serious admission at pages 46-47, generally, and footnote 12, in particular: Plaintiffs' trial counsel knew the possibility of a dismissal with prejudice effectuating an unintended legal dismissal of the alleged principal hospital; notwithstanding this prior knowledge of the issues from the cited Vickers case; having practiced malpractice trial law for 30 years, Mr. Kenney was "well cognizant" of a Court of Appeals decision which, if the results went the other way, might destroy the Plaintiffs' case if not handled carefully and properly. For some reason, Mr. Kenney, an unusually experienced and well-regarded trial attorney, chose to dismiss Dr. Douglass with prejudice in a carefree manner. Two lower court Judges, Honorable Daniel Kelly of the St. Clair County

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Circuit Court and Honorable Christopher Murray of the Michigan Court of Appeals both held Plaintiffs' counsel to the catastrophic legal effects, even if Judges Kelly and Gage did not.

Silent fraud? It cannot be silent fraud when a knowledgeable lawyer who already clearly knows about the precise legal controversy gets "out lawyered" by other lawyers. An attempt at reformation or an MCR 2.612(C) Motion For Relief are not vehicles to act as a "Fail Safe" when a trial lawyer takes imprudent or unnecessary risks.

CONCLUSION

The Court of Appeals' majority below should be vacated and reversed, the decision of the trial court affirmed in full, the Larkin Court of Appeals decision should be overruled in favor of a correcting decision by the Michigan Supreme Court, and, above all else, Dr. Douglass should be permanently removed from all liability and should be excluded as a party in this litigation in all respects, together with all costs of appeal.

Respectfully submitted,

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